Draft Guidance for Industry

Listing of Ingredients in Tobacco Products

DRAFT GUIDANCE

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Additional copies are available from:
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Food and Drug Administration
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http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation

U.S. Department of Health and Human Services
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Contains Nonbinding Recommendations

Draft – Not for Implementation

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I. Introduction

This guidance document is intended to assist persons making tobacco product ingredient submissions to FDA. The guidance document explains, among other things:

- The statutory requirement to submit a list of all ingredients in tobacco products;
- Definitions;
- Who submits ingredient information;
- What information is included in the submissions;
- How to submit the information;
- When to submit the information; and
- FDA's compliance policies.

FDA's guidance documents, including this guidance, do not establish legally enforceable responsibilities. Instead, guidances describe the Agency's current thinking on a topic and should be viewed only as recommendations, unless specific regulatory or statutory requirements are cited. The use of the word *should* in Agency guidances means that something is suggested or recommended, but not required.

II. Background

[1] This guidance has been prepared by the Center for Tobacco Products at the U.S. Food and Drug Administration.

On June 22, 2009, the President signed the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) (Public Law 111-31) into law. The Tobacco Control Act granted FDA important new authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors. Among its many provisions, the Tobacco Control Act added section 904 to the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 387d), establishing requirements for tobacco product ingredient submissions.

Section 904(a)(1) of the act requires each tobacco product manufacturer or importer, or agent thereof, to submit a listing of all ingredients, including tobacco, substances, compounds, and additives that are added by the manufacturer to the tobacco, paper, filter, or other part of each tobacco product by brand and by quantity in each brand and subbrand. For tobacco products on the market as of June 22, 2009, information required under section 904(a)(1) must be submitted by December 22, 2009 (6 months after the date of enactment of the Tobacco Control Act) and include the ingredients added as of the date of submission. For tobacco products not on the market as of June 22, 2009, section 904(c)(1) requires that the list of ingredients be submitted at least 90 days prior to delivery for introduction into interstate commerce. Section 904(c) of the act also requires submission of information whenever additives, or the quantities of additives, are changed.

The failure to provide any information required by sections 904 is a prohibited act under section 301(q)(1)(B) of the act (21 U.S.C. 331(q)(1)(B)). In addition, under section 903(a)(10)(A) of the act, a tobacco product is deemed misbranded if there was any failure or refusal to comply with any requirement prescribed under section 904. Violations relating to section 904 are subject to regulatory and enforcement action by FDA, including, but not limited to, seizure and injunction.

III. Discussion

FDA has developed an electronic submission tool, eSubmitter, to streamline submission and receipt of the ingredient information required by sections 904(a)(1) and 904(c) of the act. FDA has developed a paper form (FDA Form 3742) as an alternative submission tool, although FDA strongly encourages electronic submission. Both the eSubmitter application and the paper form can be accessed at http://www.fda.gov/tobacco.

A. What definitions apply?

FDA intends to use the following definitions in implementing the ingredient listing requirements of section 904 of the act:

1. *Additive:* The term “additive” means “any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristic of any tobacco product (including any substances intended for use as a flavoring or coloring or in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding), except that such

term does not include tobacco or a pesticide chemical residue in or on raw tobacco or a pesticide chemical" (section 900(1) of the act (21 U.S.C. 387(1)).

2. *Importer:* The term "importer" means the owner or consignee at the time of entry of a tobacco product into the United States.
3. *Pouch:* The term "pouch" means a permeable pouch, intended to be filled with pre-portioned tobacco product and placed in the oral cavity with the tobacco product.
4. *Tobacco Product*: The term "tobacco product" means "any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product)" (section 201(rr) of the act (21 U.S.C. 321(rr))). This term does not include an article that is a drug, a device, or a combination product as defined in the act (section 201(rr) of the act (21 U.S.C. 321(rr))). Thus, the term is not limited to products containing tobacco, but also includes components, parts, and accessories of tobacco products, whether they are sold for further manufacturing or are ready for consumer use. For example, tobacco, papers and filters are tobacco products, whether they are sold to consumers for use with roll-your-own tobacco or are sold for further manufacturing into a product sold to a consumer, such as a cigarette.
5. *Tobacco Product Manufacturer:* The term "tobacco product manufacturer" means "any person, including any repacker or relabeler, who (A) manufactures, fabricates, assembles, processes, or labels a tobacco product; or (B) imports a finished tobacco product for sale or distribution in the United States" (section 900(20) of the act (21 U.S.C. 387(20)). Thus, the term is not limited to persons who manufacture products containing tobacco, but includes anyone who manufactures any tobacco product as defined above.

B. Who submits ingredient information?

The requirements under 904(a)(1) apply to each "tobacco product manufacturer or importer." We interpret this to mean that domestic manufacturers are to submit the required ingredient information for products they manufacture and, for tobacco products that are imported, the required ingredient information is to be submitted by either the foreign manufacturer or the importer of the product. This includes any tobacco product, whether for sale to consumers or for further manufacturing.

At this time, FDA intends to enforce the ingredient listing requirements with respect to:

- manufacturers and importers of cigarettes, smokeless tobacco, and roll-your-own tobacco that are ready for consumer use; and
- manufacturers and importers of tobacco, filters, papers, and pouches, whether such products are intended for further manufacturing or are ready for consumer use. This includes tobacco, filters, and papers sold separately, in kits (such as for roll-your-own tobacco), or as part of accessories.

At this time, FDA does not intend to enforce the ingredient listing requirements in other circumstances.

FDA intends to focus enforcement of the ingredient listing requirements on the manufacturers and importers of cigarettes, smokeless tobacco, and roll-your-own tobacco that are ready for consumer use as well as manufacturers and importers of tobacco, filters, papers, or pouches, whether such products are intended for further manufacturing or are ready for consumer use, because these comprise the principal components of most tobacco products sold to consumers. Should the agency find that additional information is needed to protect the public health, the agency may reconsider this compliance policy. We intend to communicate any such compliance policy changes by guidance and/or rulemaking.

For tobacco products that are imported, the required ingredient information is to be submitted by either the foreign manufacturer or the importer. The foreign manufacturer and the importer or importers of an imported product will need to work together to ensure that the ingredient information is submitted to FDA as required by section 904. If there is a failure or refusal to comply with the ingredient listing requirements then among other things the product is deemed misbranded under section 903(a)(10)(A) and therefore subject to refusal of admission into the United States.

If a party submits an ingredient list as an agent on behalf of a manufacturer or importer, the agent should be specifically authorized by the other party to submit on their behalf and should state clearly the person on behalf of whom it is submitting the ingredient list.

C. What information is submitted with the list of ingredients?

1. Manufacturer/Importer Identification

The name and address of each tobacco product manufacturer/importer, and the name and address of any agent submitting ingredient information on their behalf, are to be submitted along with ingredient information. FDA requests that you also provide additional information to assist us in communicating with you, including:

- An email address, to facilitate correspondence between you and FDA.
- A Data Universal Numbering System (D-U-N-S®) Number or other unique identifier (codes) of a business entity. The business entity identifier recognized by the FDA Data Council is the Data Universal Numbering System (D-U-N-S®) Number.[2] Dun & Bradstreet assigns and maintains a database of the D-U-N-S® Numbers, which serve as unique identifiers (codes) of business entities. Upon application, each business entity is assigned a distinct site-specific 9-digit D-U-N-S® Number. The site-specific D-U-N-S® Number for an entity is a useful resource for FDA in identifying the establishment. If the D-U-N-S® Number for a location has not been assigned, a business may obtain one for no cost directly from Dun & Bradstreet (*http://www.dnb.com*). Please note that registrants who wish to obtain a new D-U-N-S® Number should obtain one well in advance of FDA's deadline since the

[2] D-U-N-S® Numbers are proprietary to and controlled by Dun & Bradstreet (D&B).

processing time involved in receiving a D-U-N-S® Number may take at least 30 days. Alternatively, you may elect to receive a D-U-N-S® Number within one business day by paying a fee.

2. Product Identification

Under section 904(a)(1) of the act, tobacco product manufacturers/importers are required to submit ingredient lists for "each tobacco product by brand and by quantity in each brand and subbrand." We interpret this to require that tobacco product manufacturers/importers submit ingredient lists individually for tobacco products that differ in any way, other than packaging differences that do not affect characteristics of the product. For example, if a soft pack and a hard pack of cigarettes have different moisture contents, shelf lives, or ingredient compositions (including ingredients introduced in packaging but known or reasonably expected to become incorporated into the consumed product), they are considered to be distinct products requiring separate ingredient lists for purposes of section 904(a)(1). Conversely, if the cigarettes sold in different packaging configurations are identical, a single ingredient list should be submitted for the product, noting the different packaging configurations.

Each product for which an ingredient list is submitted is to be clearly and uniquely identified by its brand and subbrand, which includes identifying the type or category of tobacco product (e.g., cigarette, snus). You should include unique commercial names and/or identification numbers (e.g., catalog numbers or Universal Product Codes) as needed to uniquely identify the brand and subbrand of the product. If you manufacture or import products for further manufacturing and your products are not identified by a brand or subbrand name, you are to uniquely identify your products and include the type or category of product (e.g., paper, filter). You should do so by using a commercial name and/or any identification numbers necessary to uniquely identify your product.

When you submit an ingredient list by quantity for each of your tobacco products that differs from others in any way (other than packaging differences that do not affect the characteristics of the product), we will consider you to have satisfied the 904(a)(1) requirements that you list ingredients "by brand and by quantity in each brand and subbrand."

3. Ingredient Identification

Section 904(a)(1) of the act sets forth the requirements for submission of ingredient information. The statute requires a listing of all ingredients, including tobacco, substances, compounds, and additives that are added by the manufacturer to the tobacco, paper, filter, or other part of each tobacco product as of the date of submission. Ingredients must be specified for each brand and subbrand of tobacco product. FDA considers all ingredients added directly by or at the direction of the tobacco product manufacturer to be added by the manufacturer. FDA considers ingredients that are introduced in packaging and that are known or may be reasonably expected to become incorporated into the consumed product to be ingredients that are added by the manufacturer to the tobacco product. Similarly, FDA considers any ingredient that is known or

reasonably expected to be formed through a chemical reaction during tobacco product manufacturing to be an ingredient added by the manufacturer.

Each listed ingredient is to be uniquely identified so as to distinguish it from similar or related materials. The information necessary to uniquely identify an ingredient varies based upon the type of ingredient as discussed below.

(a) Single Chemical Entities and Single Naturally-Derived Materials

Ingredients that are individual chemical entities, which may be purchased or prepared in-house and purified, may be uniquely identified by using a unique scientific name or code, such as the FDA UNII (Unique Ingredient Identifiers) code, CAS number, or IUPAC name. To further identify these ingredients, FDA requests that you provide the type/grade/quality of the ingredient, the expected function(s) of each ingredient, and any internal identification number (e.g., SKU, product code) used by your company to reference the ingredient. If you prepare a non-reactive mixture of single purified chemical entities (e.g., a buffer), you are to report each of the single chemical entities in the mixture individually.

Single naturally-derived materials are prepared solely by mechanical processing (e.g., grinding, pressing) that involves no chemical, additive, or substance other than potable water. Each single naturally-derived material is to be uniquely identified, such as by using the FDA UNII code; a commercial product name, identification code, and manufacturer; or by providing the genus, species, variety/subspecies, part of the plant, and other information necessary to uniquely identify the material. Differences in mechanical processing are not ordinarily necessary to uniquely identify a single naturally-derived material. For tobacco, however, in addition to the general identifiers, we interpret that the cure method (i.e., flue, fire, sun, steam, air) is necessary to uniquely identify tobacco-derived materials in this category (e.g., tobacco leaf and parts), because it changes the tobacco composition by altering endogenous constituents (e.g., sugars) and in some circumstances adding exogenous constituents (e.g., from partially pyrolyzed organic matter), thus resulting in a distinctly different tobacco material. Similarly, we believe genetic or transgenic (e.g., tobacco mosaic virus RNA vector) manipulation yields a material that is intrinsically distinct from unmodified tobacco and is therefore necessary as part of the unique identification. FDA requests that you further identify natural materials by type/grade/quality of the ingredient, expected function(s) of each ingredient, and any internal identification number (e.g., SKU, product code) used by your company to reference the ingredient.

We recommend using the FDA UNII code to uniquely identifying single chemical entities and single naturally-derived materials. FDA's Substance Registration System (SRS) supports health information technology initiatives by generating unique ingredient identifiers for ingredients in FDA-regulated products. The FDA UNII is a non-proprietary, free, unique, non semantic, alphanumeric identifier based on a substance's molecular structure and/or descriptive information. For the purposes of the SRS system, substances that form non-covalent interactions with other added substances are not new substances or mixtures of substances; they are defined as separate substances.

Many ingredients already have FDA UNIIs. For ingredients that are not already in SRS, you can request an FDA UNII by submitting necessary information to tobacco-UNII@fda.hhs.gov. More information regarding SRS is posted at http://www.fda.gov/ForIndustry/DataStandards/SubstanceRegistrationSystem-UniqueIngredientIdentifierUNII/default.htm.

(b) Commercially Available Complex Materials

For the purposes of this guidance, complex materials are any materials that are not single chemical entities or single naturally-derived materials. This guidance divides them into two groups – those that are made to your specifications and those that are not.

Complex materials that are made to your specifications, including such materials purchased via contract or other commercial arrangements, are to be uniquely identified. For this, we believe it is necessary to provide:

- the manufacturer's name;
- a uniquely identifying item name and/or number (e.g., catalog number or UPC) used by the manufacturer; and
- information to uniquely identify each specified ingredient (i.e., each ingredient you specified that the manufacturer use in manufacturing).

Each specified ingredient is to be uniquely identified in the same manner as used for other ingredients. To further identify these materials that are made to your specifications, FDA requests that you provide the type/grade/quality of each specified ingredients, the expected function(s) of each specified ingredient, and any internal identification number (e.g., SKU, product code) used by your company to reference the material, as well as any additional specifications for the material (e.g., release specifications, acceptance criteria, a sample certificate of analysis).

Complex materials that are not made to your specifications are to be uniquely identified. For this, we believe it is necessary to provide the manufacturer's name and a uniquely identifying item name and/or number (e.g., catalog number or UPC) used by the manufacturer. To further identify these materials, FDA requests that you provide the type/grade/quality of the material, the expected function(s) of the material, and any internal identification number (e.g., SKU, product code) used by your company to reference the material.

(c) Reaction Products

When a material is known or reasonably expected to be formed through a chemical reaction during tobacco product manufacturing, FDA considers the resultant material to be an ingredient that is added by the tobacco product manufacturer. As such these reaction products are to be listed in the ingredient listing. Reaction products may result from, among other things, reactions that occur during a mixing operation, during an in-process holding step, or during a storage period. The reaction product(s) may result from a reaction between ingredients in the same part

of a product (e.g., reconstituted tobacco) or between ingredients added to different parts of the product (e.g., tobacco, paper) or added at different manufacturing steps.

Each reaction product ingredient is to be uniquely identified in the same manner as used for other ingredients. To further identify these reaction products, FDA requests that you state which added ingredients combined to form the reaction product ingredient and the expected function(s) of the reaction product ingredient.

4. Part to Which the Ingredient is Added

Section 904(a)(1) of the act requires a listing of ingredients that are added by the manufacturer to the tobacco, paper, filter, or other part. FDA interprets this to mean that manufacturers/importers are to specify whether an ingredient is added to the tobacco, to the paper, to the filter, or to another part of the tobacco product.

5. Ingredient Quantity

Under section 904(a)(1) of the act, you must report ingredients by quantity by brand and subbrand. The reported quantity of ingredients contained in a tobacco product should account for all additions, losses (e.g., of water or volatile solvents), and chemical reactions that may reasonably be expected to occur during manufacturing. Under section 904(d) and (e), FDA is required to publish a list of harmful constituents by quantity in each brand and subbrand. FDA cannot publish such a list useful for comparing all brands unless you provide ingredient information using units that are consistent across all products. In addition, the reporting of ingredient quantity is intended to provide the agency with information to assist with implementation of other provisions of the act (e.g., developing tobacco product standards and making substantial equivalence determinations). As such, the quantity needs to be reported in consistent units across all products using an absolute measurement that is conserved during chemical reactions. FDA therefore interprets the term quantity to mean a unit of mass (i.e., grams with a standard International System of Units prefix as appropriate) of an ingredient contained in a tobacco product.

For all tobacco products, quantity should be expressed in terms of the unit of use for a portioned tobacco product (e.g., one cigarette) or per gram of product for a non-portioned tobacco product (e.g., container of loose snuff, reconstituted tobacco). Solvents or other ingredients that are added and subsequently removed during manufacturing are still considered to be added ingredients under section 904(a)(1) of the act. As such, the removed ingredient is to be identified, and the residual quantity stated (with an appropriate detection limit if the quantity is approximated near zero). If an ingredient is not added in fixed quantities, but is used to adjust the content (e.g., total fructose or total sugar) or characteristics (e.g., pH) of a mixture, the quantity should be reported as "varies," and should be accompanied by information on how the amount added is determined (e.g., tested parameters, adjustment specification limits of acceptance) and the average amount added (e.g., 1 std dev, 25-75 percentile).

D. How do you submit ingredient information?

The FDA eSubmitter tool is an electronic application designed to streamline the data entry process for ingredient submission. This tool provides an automatic acknowledgement of FDA receipt, and allows users to import large quantities of structured data and attach files (e.g., PDF documents). The FDA eSubmitter tool can also streamline the process for submitting updated ingredient listing information required by section 904(c) of the act.

While electronic submission is not required, FDA is strongly encouraging electronic submission to facilitate efficiency and timeliness of data submission and management.

Users of the eSubmitter tool first download and install the computer application, enter all data, and then upload the completed data through the FDA Electronic Submissions Gateway (ESG). The FDA ESG system requires users to apply for a free account before submitting data, a process which can take one to three weeks. FDA therefore urges registrants to apply for ESG accounts well in advance of the statutory deadline for data submission. The eSubmitter tool is available at http://www.fda.gov/ForIndustry/FDAeSubmitter.

FDA intends to make the eSubmitter system available for submitting listing of ingredients under section 904 of the act in November 2009.

E. When do you submit ingredient information?

Under section 904, for each tobacco product on the market as of June 22, 2009, the list of ingredients must be submitted by December 22, 2009. For tobacco products not on the market as of June 22, 2009, the list of ingredients must be submitted at least 90 days prior to delivery for introduction into interstate commerce.

Section 904(c) of the act requires reporting of changes to the list of ingredients. Specifically, if a manufacturer:

- eliminates or decreases an existing additive, the change must be reported to FDA within 60 days of making the change.
- adds or increases an additive that the FDA has designated in regulations as a tobacco additive that is not a human or animal carcinogen and is not otherwise harmful to health under the intended conditions of use, the change must be reported to FDA within 60 days of making the change.
- adds a new tobacco additive or increases the quantity of an existing tobacco additive (not designated as described above), the change must be reported to FDA at least 90 days prior to making the change.

F. Will the FDA maintain the confidentiality of the ingredient information I submit?

Information submitted under section 904 of the act may include, but is not limited to, a company's non-public trade secret or confidential commercial information.

Several laws govern the confidentiality of ingredient information submitted under section 904 of the act, including sections 301(j) and 906(c) of the act (21 U.S.C. 331(j) and 387f(c)), the Trade Secrets Act (18 U.S.C. 1905), and the Freedom of Information Act (FOIA) (5 U.S.C. 552), as well as FDA's implementing regulations.

Section 906(c) of the act prohibits FDA from disclosing any information reported to or otherwise obtained by FDA under section 904, among other provisions, if that information is confidential commercial or trade secret information exempt from disclosure under FOIA Exemption 4 (5 U.S.C. 552(b)(4)). The provision contains exceptions allowing disclosure of the information to other officers or employees concerned with carrying out the tobacco products chapter of the act and, when relevant, in any proceeding under the tobacco products chapter of the act. Section 301(j) of the act generally prohibits release of trade secret information obtained by FDA under section 904, among other provisions, outside of the Department of Health and Human Services, except to courts when relevant in any judicial proceeding under the act and to Congress in response to an authorized Congressional request.

FDA's general regulations concerning the public availability of FDA records are contained in 21 CFR Part 20.
